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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 595

BETHLEHEM STEEL COMPANY
(SHIPBUILDING DIVISION),
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Respondent,

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Reply to Board's Brief

The petition herein is not premature, as the Solicitor General contends.

1. It is argued that the court below directed remand because the Board, in holding that the Company did not violate the Act by unilaterally putting its contract proposals into effect on August 13, 1959, did not consider whether the impasse was caused by petitioner's prior unfair labor practices (Board Brief, p. 12). This is contrary to the facts.

The factual findings in this case are principally contained in the Trial Examiner's intermediate report (3a-81a). The Board made no independent or contrary

findings of fact (83a-84a; 87a-92a), differing as to the Trial Examiner's legal conclusion in regard to the temporary suspension of Union privileges on August 1, 1959. Those findings, amply supported by the record, make it clear that the impasse which preceded the putting into effect of the Company's proposals on August 13, 1959, was not caused by the two prior alleged unfair labor practices, but by the head-on collision between Company and Union positions as to the economic terms of the new agreement:

"After carefully considering every fact in this long record, including those mentioned here and a multitude of others too minute to warrant repetition in this Report, and all the implications that can reasonably arise from the timing of the events and from seemingly unrelated actions, I can only conclude that this was fundamentally an economic disagreement between the Respondent and the Union...." (74A)

"The question of employee signatures to grievances was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it." (75a)

"A consistent refrain throughout the negotiation was the Union's unequivocal declaration that all the Company demands were absolutely unacceptable." (61a)

In making its initial ruling the Board "considered the Intermediate Report, the exceptions and briefs, and the entire record" and did not make any contrary findings. (84a)

Further, in the Union's Motion for Reconsideration (p. 10), which it filed with the Board on December 5, 1961, it expressly argued that a bona fide impasse could not have arisen on August 11, 1959, because of the prior *per se* violations of Section 8(a)(5) committed by

Bethlehem. The Board, although finding Bethlehem guilty of the prior violations, reaffirmed its conclusion as to Bethlehem's good faith and its ruling that Bethlehem did not violate the Act in connection with the August 13, 1959, changes.

The Board, thus, considered the very question that is now said to be the purpose of the remand, hence remand for that purpose would be a futile act and unjustifiably delay final decision on the important questions presented here.

As stated in the petition, it appears that the only purpose of the remand is to invite, if not direct, the Board to apply a *per se* rule of law to the August 13 changes, based solely on the prior unfair labor practices. This, as set forth in the petition, is contrary to the rule of law established by this court.

2. The remand directed by the lower court could not conceivably alter the questions presented by the rulings of the lower court and of the Board as to the alleged violations by petitioner in connection with the grievance-signing proposal and the cancellation of Union privileges. As is plain from the lower court's opinion, the remand has to do only with the Board ruling in respect of the August 13 changes. The rulings of the Board and the Court as to the two prior violations are, thus, also ripe for decision now.

In this connection, the Court should note that the Solicitor General concedes (Board Brief, p. 16) that "the question is debatable" whether the petitioner's grievance-signing proposal is governed by *Borg-Warner*.

Reply to Union's Brief

The Union's Brief, in large measure, restates the Union's version of the facts and its arguments on the

merits of the issues involved—matters summarily covered in the petition herein.

Aside from noting petitioner's general disagreement with the Union's statements of facts and argument, special exception is taken to the assertion (Union Brief, p. 29; see also Board Brief, p. 12, footnote 10) that "the settled rule appears to be that where uncured violations of Section 8(a)(5) occur during bargaining, a deadlock in the bargaining cannot excuse unilateral action." The cases do not support this assertion, and it is not the settled rule of law. The cases referred to hold that an impasse caused by an employer's subjective bad faith does not authorize unilateral action, for under those circumstances unilateral action is further indicative of bad faith. The rule has never been applied in a case where, as here, there is an affirmative finding that the employer was not bargaining in bad faith.

Respectfully submitted,

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